IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 30/03/2004

CORAM

THE HONOURABLE MR. JUSTICE A. KULASEKARAN

Second Appeal No. 2197 of 2003
and
C.M.P. No. 20511 of 2003

T.S. Bellieraj ... Appellant

-Vs-

1. Vinodhini Krishnakumar
2. Vidhya Nagendran
3. Veena Manjunath
4. Vinitha Yadukutesh
5. T. Venkatesh ...Respondents

Second appeal under Section 100 CPC against the Judgment and Decree dated 22-08-2003 made in A.S. No. 43 of 2003 on the file of District Judge of the Nilgiris at Udhagamandalam confirming the Judgment and Decree passed in O.S. No.31 of 1996 dated 31 2002 on the file of District Munsif, Kotagiri.

!For appellant : Mr. K.V. Venkatapathy, Senior Counsel
for Mr. A. Bobblie

^For Respondent : ---

:JUDGMENT

This appeal was posted today for admission and I heard the learned Senior Counsel appearing for the appellant.

2. The first defendant in the suit O.S. No.31 of 1996 on the file of District Munsif, Kotagiri is the appellant herein. The Plaintiffs have filed the suit for recovery of possession, mesne profits and for costs. The trial court decreed the su ainst the same, the first defendant has filed an appeal in A.S. No. 43 of 2003 which was also dismissed, hence this present second appeal.

3. The facts of the case of the Plaintiffs is that the second defendant in the suit is the father of the Plaintiffs. The Plaintiffs have permitted the second defendant to look after the properties belonged to them in the capacity of guardian. the second defendant, without the knowledge of

the plaintiffs have entered into an agreement with the first defendant. According to the Plaintiffs, the second defendant has no authority to enter into agreement for sale. Notices were exchanged between the plaintiffs and the first defendant. It is also the case of the Plaintiffs that the first defendant has no right to remain in possession of the property and his possession can only be treated as trespass, hence the first defendant is liable to pay me sne profits to the plaintiffs.

4. The case of the first defendant is that the second defendant, on behalf of his wife and minor daughters handed over possession of the suit property in or about May 1982 and also agreed to sell the same by receiving sizeable amount towards ad the Plaintiffs have also received the benefit out of the said sale consideration. The notice sent by the plaintiffs were replied. That he agreed to pay Rs.6 lakhs towards full and final settlement,

which was not agreed by the plaintiffs. At the time of agreement, the plaintiffs were minors, but suit was not filed within three years from the date of attaining majority, hence the suit is barred by limitation.

5. Before the trial court, the second defendant was set exparte. The Plaintiffs have marked Exs. A1 to A4 and the 4th Plaintiff was examined as PW1. The first defendant has marked Exs. B1 to B20 and examined himself as DW1 and one Prabhu as D
6. Mr. K.V. Venkatapathy, learned Senior counsel appearing for the appellant/first defendant argued that the second defendant had orally agreed to sell the property to the first defendant and received substantial amount from him and handed over on as early as 1982; that the suit was filed six years after attainment of majority of the youngest daughter namely the fourth plaintiff, hence the suit is barred under Article 60 of the Limitation Act. It is also further argued that possession was deli vered by the second defendant during May 1982 itself to the first defendant under oral agreement and the plaintiffs also had the knowledge, but falsely pleaded that they came to know only on 20-03-1993 when they went to the office of the Advocate, who wa s examined as DW2.

7. It is the case of the plaintiffs that there is no sale agreement or sale deed, but only an oral agreement to sell the property by their father when they were minors and pursuant to that the first defendant was put in possession of the suit p The second defendant has no title over the suit property, hence the alleged delivery of possession by the second defendant without prior permission of the Court to the first defendant is not a valid transfer. The suit was filed within twelve years sin ce it is alleged that possession was delivered in the year 1982; there is no pleading in the written statement of the first defendant that the suit filed by the plaintiffs is not maintainable under Article 65 of the Limitation Act also.

8. Article 60 of the Limitation Act runs as follows:-

Description of suit Period of Time from which
Limitation period begins to run

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60. To set aside a transfer of property made by the guardian of a ward

(a) by the ward who has three years when the ward attained majority attains majority
(b) by the ward's legal representative -

(i) When the ward dies within three years three years When the ward from the date of attains majority attaining majority
(ii)when the ward dies three years when the ward dies before attaining majority

9. Now, we look into Article 65 of the Limitation Act, which runs as follows:-

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Description of suit Period of Time from which Limitation period begins to run
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65. For possession of immovable property Twelve years When the possession

or any interest of the defendant therein based on becomes adverse to title the plaintiff.

10. Article 60 of the Limitation Act applies to a suit to set aside a transfer of property made by the guardian of a minor (s). This article only applies to cases where the transfer by the guardian is binding on the ward till it is set aside. transfer by the guardian is void ab initio or otherwise not binding on the ward, it need not and cannot be set aside. In such a case, this Article does not apply. In void ab initio transfers, when transferee in possession, ward can sue for recovery of possession treating the transfer as a nullity and such suit will be governed by Article 65 of the Limitation Act.

11. In the decision reported in (G. Annamalaipillai Vs. District Revenue Officer and others) AIR 1993 (2) SCC 492 it was held thus:

..."We have already seen that clause (3) of Section 8 of the Hindu Minority and Guardianship Act, 1956, specifically makes the transaction voidable. The lease executed by the guardian in this case is prohibited and

in that sense it was without any a ority. On the legal efficacy and the distinction between valid, void and voidable agreements, we find the following passage in Salmond on Jurisprudence, Twelfth Edition at page 341:
"... A valid agreement is one which is fully operative in accordance with the intent of the parties. A void agreement is one which entirely fails to receive legal recognition or sanction, the declared will of the parties being wholly destitute of legal e fficacy. A voidable agreement stands midway between these two cases. It is not a nullity, but its operation is conditional and not absolute. By reason of some defect in its origin it is liable to be destroyed or cancelled at the option of one of the part ies to it. On the exercise of this power the agreement not only ceases to have any efficacy, but is deemed to have been void ab initio. The avoidance of it relates back to the making of it. The hypothetical or contingent efficacy which has hitherto been attributed to it wholly disappears, as if it had never existed. In other words, a voidable agreement is one which is void or valid at the election of one of the parties to it."
This distinction has also been judicially noticed in the Privy Council judgment reported in Satgur Prasad v. Harnarain Das and in the Division Bench judgment in S.N.R. Sundara Rao and Sons, Madurai v. CIT. The Division Bench held, following the said Priv y Council judgment as follows:
'When a person, who is entitled to dissent from the alienation, does so, his dissent is in relation to the transaction as such and not merely to the possession of the alienee on the date of such dissent.
The effect of the evidence is, therefore, to get rid of the transaction with the result that in law it is as if the transaction had never taken place.'
We have, therefore, no doubt that when the fifth respondent avoided the lease executed by his father, the fourth respondent, the lease became void from its inception and no statutory rights, could, therefore, accrue in favour of the appellant herein.

In this case, the Hon'ble Supreme Court while dealing with the Hindu Minority and Guardianship Act, 1956 held that lease has become void from its inception since it was executed contrary to the provisions of Section 8 of the Act and no statutory rig ould accrue in favour of the lessee.

12. In the decision reported in (State of Maharashtra Vs. Pravin Jethalal Kamdar (dead) by LR's) AIR 2000 SC 1099
wheein in para-6 it was stated thus:-

"6. ...When possession has been taken by the appellants pursuant to void documents, Article 65 of the Limitation Act will apply and the limitation to file the suit would be 12 years. When these documents are null and void, ignoring them a suit ession simplicitor could be filed and in the course of the suit it could be contended that these documents are nullity. In Ajudh RajV. Moti S/o. Mussadi, (1991) 3 SCC 136: (1991 AIR SCW 1576: AIR 1991 SC 1600) this Court said that if the order has been passed without jurisdiction, the same can be ignored as nullity, that is, non-existent in the eyes of Law and is not necessary to set it aside: and such a suit will be governed by Article 65 of the Limitation Act. The contention that the suit was time b arred has no merit. The suit has been rightly held to have been filed within the period prescribed by the Limitation Act."

The Honourable Supreme Court held that in case of possession taken under void documents, suit to reovery possession simplicitor can be filed. There is no need to seek declaration about the invalidity of the documents. Even if relief of declaration sought along with recovery of possession, a suit would be governed by Article 65 of the Limitation Act and not by Article 58.

13. In the case on hand, no sale deed has been executed by the second defendant. It is alleged that possession was handed over by the second defendant to the first defendant/appellant herein pursuant to an oral agreement. Even the first defend nable to explain the quantum of consideration passed on. Certain amount of dispute that in view of non-execution of the sale deed or non-passing of consideration of money or no authority to effect the transfer of property, such transaction is void and i noperative in its inception, hence it is not necessary for the plaintiffs to invoke Article 60 of the Limitation Act and no need to set aside the sale at all and it is open to the parties to take recourse to the other provisions of Law of limitation. In this case, the plaintiffs sought for only for recovery of possession on the ground the alleged oral agreement between the second and first defendant was void.

14. A possession must be distinct from a possession in Law. A possession may exist in fact, but not in Law. In this case, the possession was handed over by the second defendant to the first defendant/appellant herein without any authority of l Law of limitation of instituting a suit within 12 years when possession of the defendants become adverse to the plaintiffs. As rightly pointed out by the lower appellate court, there is no plea in the written statement filed by the first defendant that the suit filed by the plaintiffs is barred by Article 65 of the Limitation Act. It is not in dispute that the suit is filed within 12 years. Applying the ratio laid down by the Hon'ble Supreme Court in the above said two cases with the facts of this c ase, no doubt the suit is in time and the findings of the Courts below that the suits are not barred by limitation perfectly valid.

15. It is argued by the learned Senior counsel for the appellant/ 1st defendant that the appellant can claim possession of the suit property as part performance. It is the case of the appellant/1st defendant that the mother and daughters have a sell the property to an extent of 30 acres out of which 12 acres were already sold by the mother of the plaintiffs to him and under the very same oral agreement, the suit property was also transferred to him.

16. Section 53-A of the Transfer of Property Act runs as follows:- "Where any person contracts to transfer for consideration any immovable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainity, and the tranferee has part performance of the contract taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract, and the transferee has performed or is willing to perform his part of the contract,

then, notwithstanding that the contract, though required to be registered, has not been registered, or, where there is an instrument of transfer, that the transfer has not be en completed in the manner prescribed therefore by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the pro perty of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract:

Provided that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof.

17. The doctrine of part performance embodied in this section is an equitable doctrine. The object of this Section is to prevent a transferor or his successor-in- interest from taking any advantage on account of the non-registration of the docu rovided the transferee has performed his part of the contract and in pursuance thereof has taken possession of some immovable property. The essentials of this Section is (i) a contract to transfer of immovable property (ii) the contract must be for cons ideration (iii) it must be in writing signed by him or on behalf of the transferor (iv) the terms can be ascertained from the writing (v) the transferee has taken possession or is already in possession of the property (vi) he has dome some act in further ance of the contract and (vii) has performed or is willing to perform his part of the contract. This section does not confer any title on the transferee who takes possession in pursuance of a written, but unregistered contract. This section can be used only as a shield and not as a sword.

18. It is evident from the written statement filed by the first defendant that he has paid substantial amount as advance to the second defendant. The courts below held that the first defendant was not certain about the quantum of amount paid to le consideration to the second defendant, besides that, the said contention was not supported by any valid evidence, either oral or documentary. It is further alleged by the first defendant that the Plaintiffs had knowledge about the transaction but the y remained silent till they filed the suit. DW2, who is none other than the counsel for the second defendant deposed that at no point of time, the plaintiffs have participated in the discussion along with the second defendant with the first defendant re garding settlement talks. DW2 further deposed that he has prepared a power of attorney based on the instructions given to him by the second defendant and the plaintiffs have come to his office only to go through the power of attorney. Hence, both the c ourts below concurred that there is no consensus ad idom between the plaintiffs as well as the intending purchaser i.e., first defendant pursuance to the alleged oral agreement made by the second defendant in respect of the suit property.

19. In the decision reported in (M/s. Rickmers Verwaltung Gimb Vs. Indian Oil Corporation Ltd) AIR 1999 SC 504 wherein in Para-12 it was held thus:-

12. The submission of Mr. Nariman that an agreement, even if not

signed by the parties, can be spelt out from correspondence exchanged between the parties, admits of no doubt. In fact, various judgments cited by him at the Bar unmistakably support t assertion. The question, however, is: can any agreement be spelt out from the correspondence between the parties in the instant case?

In this case, the Honourable Supreme Court held that to arrive at a conclusion whether there was any meeting of minds between the parties, which could create a binding contract between them but the Court is not empowered to create a contract for the rties by going outside the clear language used in the correspondence.

20. In the decision reported in (Mool Chand Bakhru and another Vs. Rohan and others) 2002 (1) CTC 433 the Honourable Supreme Court held in para-10 thus:-

10. Relying upon a few letters written by Mool Chand admitting that he had agreed to sell the property, the appeal filed by the respondents to the extent of Mool Chand's share was allowed. It was held that the respondents could protect their pos under Section 53-A of the Act. The appeal qua the share of Leela Ram's half share was dismissed. It was held that the respondents continued to be in joint possession of the property to the extent

of half share but they were not entitled to actual possess ion till partition of the property in dispute. Since the possession was joint Leela Ram was not entitled to the mesne profits as well.

In this case, it was held that Where any person contracts to transfer for consideration any immovable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable cer ity, and the tranferee has, in part performance of the contract taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part performance of the contract and has done some act in fur therance of the contract, and the transferee has performed or is willing to perform his part of the contract, then he is entitled to protect his possession in respect of the property which he was put in possession in part performance of the agreement of sale.

21. In the case on hand, the delivery of possession by the second defendant to the first defendant is not supported by any valid transfer or by title holder. While so, the first defendant cannot claim possession of the suit property as part per . The transaction in the case on hand does not satisfy the ingredients of Section 53-A of the Transfer of Property Act. Hence, the argument of the learned Senior counsel for the appellant that the appellant/first defendant is entitled to the benefit of Section 53-A of the Transfer of Property is unsustainable.

22. The courts below have also rightly held that in respect of mesne profits, an enquiry under Order 20 Rule 12 CPC is required.

23. For the foregoing reasons, I do not find any question of Law, much less substantial question of Law in this case. Under the provisions of Section 100 CPC a second appeal lies on substantial questions of Law. Re-appreciation of evidence in ond appeal is not permissible. A concurrent finding of fact is not assailable in second appeal. Hence, the second appeal is dismissed. No costs. Connected CMP is closed.

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Internet ; Yes

To

1. The District Judge
District Court of the Nilgiris
at Udhagamandalam

2. The District Munsif
District Munsif Court

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